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Tulsa Race Massacre Symposium Keynote Speech

Suzette Malveaux

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TULSA RACE MASSACRE SYMPOSIUM KEYNOTE SPEECH

Suzette Malveaux*

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I. INTRODUCTION

We were so honored to have had Professor Suzette Malveaux—Provost Professor of Civil Rights Law and Director of the Byron R. White Center for the Study of American Constitutional Law at the University of Colorado—give the keynote address at the Tulsa Race Massacre Symposium.¹ She is one of the original attorneys who brought the federal lawsuit alleging constitutional violations by the City of Tulsa and State of Oklahoma against the victims of the Tulsa Race Massacre of 1921, one of the worst government-sanctioned racial massacres in American history.

*For six years, she provided pro bono representation for the plaintiffs in *Alexander v. Oklahoma*, seeking relief in the federal district court of the Northern District of Oklahoma, the Tenth Circuit Court of Appeals, and the United States Supreme Court. As a young lawyer, she drafted the original complaint (with Eric Miller) and authored and edited major briefs, including an amicus brief on behalf of historians John Hope Franklin, Scott Ellsworth, and others. She also represented her clients before the Inter-American Commission on Human Rights of the Organization of American States (OAS) and the United States House of Representatives.*

*Professor Malveaux wrote the seminal article on the statute of limitations in the case, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*.² Her article has been cited in dozens of law review articles and received hundreds of downloads on SSRN. At the request of the Chairman of the House Judiciary Committee, at a hearing before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties,*

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1. Suzette M. Malveaux, Provost Professor of Civil Rights Law and Director of the Byron R. White Center for the Study of Constitutional Law, University of Colorado Law School, Keynote Speaker at the University of Tulsa Law Review Symposium: 1921 Tulsa Race Massacre (May 21, 2021), available at <https://law.utulsa.edu/race-massacre-symposium/>.

2. Suzette M. Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 GEO. WASH. L. REV. 68 (2005).

her article was entered into the record in support of H.R. 1995, the Tulsa-Greenwood Race Riot Claims Accountability Act of 2007. Her article remains timely, having been recently cited in 2019 in support of H.R. 40, the Commission to Study and Develop Reparation Proposals for African-Americans Act, 116th Congress (2019-2020).

*She traveled around the country with her co-counsel and clients sharing the story of the Massacre and their fight for justice. She has spoken at various venues, including law schools, churches, and community events. Her pro bono legal work has been featured in the Emmy award-winning documentary, *Terror in Tulsa*, and the documentary *Before They Die*. She was interviewed with 105-year-old, Otis Clark, the oldest survivor of the Massacre in the lawsuit.*

Professor Malveaux brings a wealth of first-hand insight, legal knowledge, and passion to the table, and we were honored that she shared this as our keynote speaker.

II. TULSA RACE MASSACRE SYMPOSIUM: EDITED KEYNOTE OF SUZETTE MALVEAUX

Thank you so much. I am really honored to be here. I really appreciate the invitation. I want to start off by thanking the University of Tulsa College of Law and the *Tulsa Law Review*. I am honored to have been invited to share my experiences, and I look forward to your thoughts. I really appreciate this morning—all of the comments and information. This is an important conversation we are having, and I am learning myself from the program.

I would like to start with the University of Tulsa and give a couple shout outs. I will start with the Dean, Lyn Entzeroth, for her generous funding of this program. We so appreciate that. I want to give a shout out to a number of professors who made me feel so welcomed and who are spearheading this effort. Professors Tamara Piety, Mimi Marton, and Warigia Bowman, thank you for the invitation. I also want to thank the Law Review students who have been working hard in the background making all of this happen; so a shout out to Adam Heavin, Sage Martin, Korie Kirtley, and Mason McMillan. And, of course, I have to thank Crystal Rutherford in the background and all of the other IT folks making all this happen.

I want to say it is so good to be back here in Tulsa. I was here years ago with our team. There was a team of us who had worked on Constitutional litigation twenty years ago and our team congregated at the Oaklawn cemetery. We had a chance to think, reflect, and analyze what it was like to be involved in this work and our journey together and, just allow ourselves to cry. I do not think we had done that before. And it was such an important moment. It feels good to come back and give yourself permission to reflect on the work we did together.

I am also pleased to make the historic development of the Buck Colbert Franklin Legal Clinic, named in honor of B.C. Franklin, one of the most pre-eminent Black lawyers in Greenwood during the time of the 1921 Race Massacre. While I am here to talk about our Constitutional litigation in the federal court challenging one of the worst government-sponsored race massacres in the history of our country, our case was not the first one. This was not the first case or first effort to challenge what happened.

B.C. Franklin, the father of the renowned historian John Hope Franklin, initially

sought relief.³ It was just extraordinary. Let me share with you a picture of him.



Photograph of B.C. Franklin | Image courtesy of Tulsa Historical Society & Museum

3. *The Victory of Greenwood: B.C. Franklin*, THE VICTORY OF GREENWOOD, <https://thevictoryofgreenwood.com/2020/10/20/the-victory-of-greenwood-b-c-franklin/?v=7516fd43adaa> (last visited Sept. 10, 2021).



Photograph of B.C. Franklin, I.H. Spears, and Effie Thompson, June 6, 1921 | Image courtesy of Tulsa Historical Society & Museum

I am so humbled to think that, just days after the Massacre, he had set up shop in a tent, put together a makeshift law firm.⁴ He had nothing but his typewriter and his books.⁵ He worked side-by-side with his law partner I.H. Spears and his secretary Effie Thompson in this tent.⁶ It was June 6, 1921, literally days after the Massacre, when he was trying to bring insurance claims for property loss suffered by the Black Greenwood community.⁷

I would like to give a shout out to the clinic and the important work you are doing for the people in North Tulsa. There is so much work to be done around housing, unemployment, and small business formation. Of course, you also know that the eviction rate in Tulsa is one the highest in the country. This work is really critical work, and I thank you for promoting and carrying on that legacy.

It feels good to talk about a case that really helped shape me in many fundamental ways and inspired my career as a civil rights lawyer. I practiced civil rights for eight years. Then I left the civil rights practice and transitioned to legal academia, where I have been now for eighteen years. There is only one case that I decided to bring with me, to hold

4. *Id.*

5. *Id.*

6. *Id.*

7. Alaina E. Roberts, *B.C. Franklin and the Tulsa Massacre*, PERSPS. ON HIST. (May 26, 2021), <https://www.historians.org/perspectives/issues/2003/0303/0303>.

onto, and that was this case. And as you heard, I was able to represent the victims of the Tulsa Race Massacre for six years in a pro bono capacity. These were formative years for me, and I am so grateful to a team of people that I had the privilege of being able to work with. I do want to recognize and acknowledge those people. There are some who were in the background, who worked tirelessly for years behind the scenes. There are others who are household names and are famous. They are: Michael Hausfeld, Agnieszka Fryszman, Professor Charles Ogletree, Michele Roberts, Professor Adjoa Aiyetoro, Leslie Mansfield, James Goodwin, Joe Sellers, Johnnie Cochran, Dennis Sweet, Sharon Cole Jones, Rose Sanders, Willie Gary, Lorenzo Williams, Tricia Purks Hoffler, Jim Lloyd, Professor Al Brophy, Historian John Hope Franklin, Professor Roy Brooks, Professor Roy Brooks, Damario Soloman-Simmons, J.L. Chestnut, and Eddie Faye Gates. And I will give a super shout out to Eric Miller, now also a law professor. He and I were baby lawyers at the time. We drafted the original complaint, not knowing what we were doing! [Laughing] We were fighting in the dark at the time. And so I do want to acknowledge our team.

We are gathered here today to mark the 100th anniversary of the Tulsa Race Massacre. I was asked to give some remarks, both professional and personal, about the efforts our team made to bring relief to the victims of the Tulsa Race Massacre. I want to reflect on the larger context in which this is taking place and some lessons I have learned.

We are gathering at a time of great challenge and profound import in American history. This is a time that calls for serious reflection, critical thinking, rigorous analysis, and ultimately bold action. We are living in what feels like extraordinary times.

The country has been destabilized by a number of threats to our democratic norms and institutions, most recently and importantly the voter franchise.

The country has been in the midst of a global pandemic that has pushed people to their limits economically, socially, and mentally. This pandemic has highlighted an uncomfortable truth: the ongoing health disparities, making Black Americans three times more likely to die from COVID-19 than their white counterparts.

The country has an extreme wealth gap that has only grown. We know the richest one percent of Americans have more wealth than the bottom ninety percent.⁸ This is also reflected in our racial demographics, where the average white family has ten times more net wealth than the average Black family.⁹

The country, we know, is in the midst of a racial reckoning. There has been justifiable outrage and activism over police brutality across the country. There has been increased frustration with increased violence against marginalized groups, whether it is Black or brown people or other folks including Asians, Muslims, and transgender persons.

So while these may feel like extraordinary times, in many ways these issues are actually very familiar.

8. Christopher Ingraham, *Nation's Top 1 Percent Now Have a Greater Wealth than the Bottom 90 Percent*, SEATTLE TIMES, <https://www.seattletimes.com/business/economy/nations-top-1-percent-now-have-greater-wealth-than-the-bottom-90-percent/> (last updated Dec. 8, 2017, 6:11 AM).

9. Kriston McIntosh et al., *Examining the Black-white Wealth Gap*, BROOKINGS (Feb. 27, 2020), <https://www.brookings.edu/blog/up-front/2020/02/27/examining-the-black-white-wealth-gap/>.

Today, the “strange fruit” that hung from trees in the 1930s lies on the ground in Ferguson for over four hours before being picked up.



IMAGE 1¹⁰



IMAGE 2¹¹

Today, the “poll taxes,” and literacy exams that disenfranchised emancipated slaves post-Reconstruction are the voter I.D. laws, opposition to mail-in ballots, and other voter suppression methods.



IMAGE 3¹²



IMAGE 4¹³

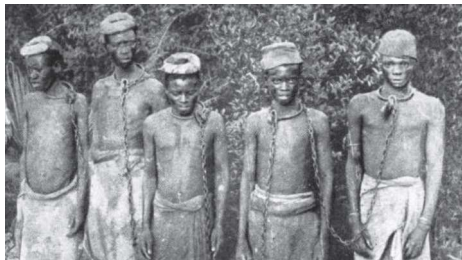
10. The lynching of Laura Nelson from the North Canadian River Bridge, 1911 (photographed by George Henry Farnum).

11. The body of Michael Brown lies covered with a sheet on August 9, 2014 (photographed by Tiffany Mitchell).

12. A poll tax sign in Minelo, Texas, 1939 (photographed by Russell Lee).

13. Detroit Will Breathe supporter Betsy Camaredo holds a sign that says “Count Every Vote” outside of the Detroit Department of Elections Central Counting Board of Voting (photographed by Kent Nishimura).

Today, slave labor has been replaced with a school to prison pipeline and a robust prison industrial complex.

IMAGE 5¹⁴IMAGE 6¹⁵

Today, the hooded KKK members whose terror was fed at clandestine night rallies have been replaced with proud hate groups whose tentacles reach the vulnerable worldwide on the internet and social media.

IMAGE 7¹⁶IMAGE 8¹⁷

The United States is in the midst of the largest civil rights reckoning since that of the 1960s, and calls for justice for Black and other marginalized communities are stronger than ever.

One of the main things I have learned about what it takes to be engaged in transformative justice is it requires a lot of creativity. And sometimes, when you do not reach the goal post, you move it, and claim victory. You have to be willing to redefine

14. Photograph of a shackled slave chain gang.

15. Photograph of prisoners in a recreation yard at Deuel Vocational Institution in Tracy, California (photographed by Noah Berger).

16. Photograph of hooded Klu Klux Klan members.

17. Photograph of the Unite the Right Torch Rally in Charlottesville, Virginia (photographed by Andrew Shurtleff).

success and to keep persevering. And that is really our story in terms of our efforts to seek justice for the victims of the Tulsa Massacre that was brought twenty years ago.

I would like to share with you a little bit about that story. Let us go back 100 years ago in Tulsa. We know that the City of Greenwood was one of the most thriving and prosperous African-American communities in the country at the time, so successful that it was called the “Negro Wallstreet.”¹⁸

The conflict started like so many other conflicts post-Reconstruction—not just in the South, but also here in the Midwestern states as well—where you have a young African-American male (Dick Roland) accused of assaulting a young white woman.¹⁹ Roland was just a teenager and he was going into a government building to go to the bathroom.²⁰ Back then, when you had to go to the bathroom and you were Black, you could not go to any bathroom because we were in a segregated system.²¹ So he went into that building and into the elevator.²² He was accused of assaulting a white female in the elevator but the charges against him were ultimately dropped.²³ There was no evidence of any assault.²⁴ It seems that he might have tripped and tried to brace himself, or that he was embracing his girlfriend.²⁵ There are a couple different theories in terms of what actually happened.

He was ultimately thrown into jail near the local courthouse and a white mob started to form outside the courthouse.²⁶ The rumor was that we was going to be lynched.²⁷ Now this is something that Professor Bowman had referenced earlier. This was a very serious threat at the time. The threat of lynching was a tool of terror that was used often during this time period. In fact, in 1921, fifty-nine African Americans were lynched in the southern/border states.²⁸ From 1911 to 1921, twenty-three Blacks in Oklahoma alone were lynched.²⁹ During this time period, this is what they called the lynching era, from 1880 to 1930, that fifty year time period.

This was a time of untold brutality against Black people in terms of beating, murder, rape, and lynching. Here [referring to photo], there is a mother and her son who were lynched in Oklahoma. This was the same sort of scenario. They were in a local jail accused of a crime, and a white mob dragged them out of the jail. They raped her first, then gagged and hung both of them. You can see [referring to photo] there are gawkers here. It turns

18. Tom Huddleston Jr., *‘Black Wall Street’: The History of the Wealthy Black Community and the Massacre Perpetrated There 100 Years Ago*, CNBC (July 4, 2020, 9:00 AM), <https://www.cnbc.com/2020/07/04/what-is-black-wall-street-history-of-the-community-and-its-massacre.html>.

19. TULSA RACE RIOT: A REPORT BY THE OKLAHOMA COMMISSION TO STUDY THE TULSA RACE RIOT OF 1921, at 56 (2001) [hereinafter A REPORT].

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 57.

24. *See* A REPORT, *supra* note 19.

25. *Id.* at 57.

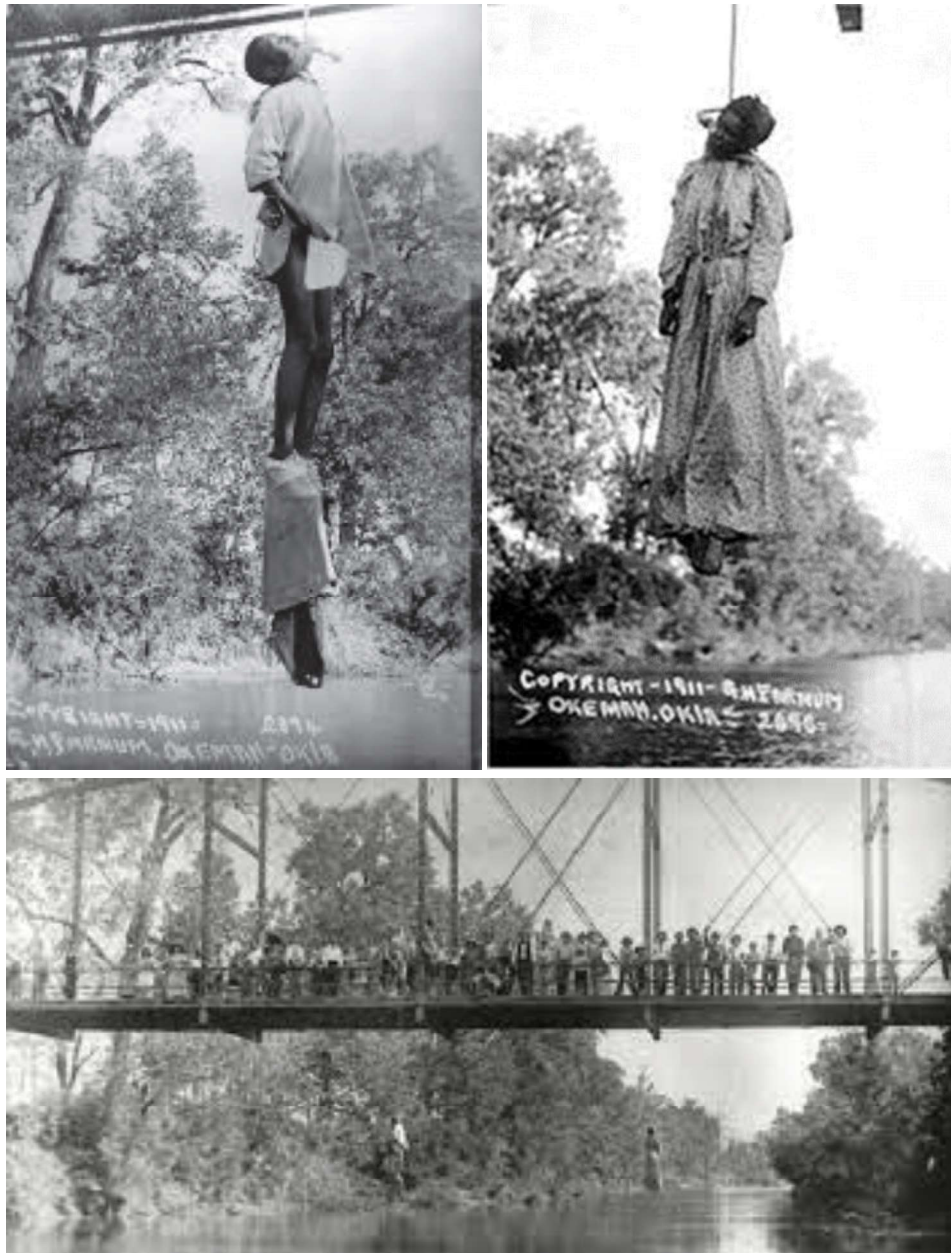
26. *Id.* at 57–58.

27. *Id.* at 59.

28. Robert L. Zangrando, *James Weldon Johnson and the Dyer Anti-Lynching Bill*, 8 LANGSTON HUGHES REV. 76, 77 (1989).

29. Natalie Chang, *The Massacre of Black Wall Street*, THE ATLANTIC, <https://www.theatlantic.com/sponsored/hbo-2019/the-massacre-of-black-wall-street/3217/> (last visited Sept. 19, 2021).

out that pictures like these were very popular postcards at the time, and a lot of people profited off of those postcards. Racial hatred and unspeakable torture was what was going on during that time period. It was a very real threat.



Photograph of Laura Nelson and her son, L.W. Nelson lynched by a white mob in Okemah, Oklahoma, on May 25, 1911 | George Henry Farnum, photographer

I think what is also interesting about what happened during those days is how Black

veterans came to their [Black Tulsans'] defense. At this time, Black veterans could not get the benefit of the GI bill. Ironically, they came back to "separate but equal" after they had fought for their country. Here, they were trying to protect American citizens. So this was what the situation looked like.

It is unclear how it started, but we know that a gunshot went off and this was the beginning of one of the worse race massacres in the history of our country. We know that within a short period of time, less than twenty-four hours, the entire Greenwood District was destroyed by this white mob deputized by the City of Tulsa and the State of Oklahoma.³⁰ The government literally armed its white citizens and deputized them, and gave them the authority to kill Black citizens.³¹ In fact, up to five hundred white men were sworn in by the police as "Special Deputies" and were given instructions to "get a gun and get a N."³² This mob was unleashed on innocent men, women, and children.³³ About three hundred African Americans were killed, that have been confirmed.³⁴ That may be, in fact, in the thousands. Ten thousand people were left homeless and the entire community burnt to the ground—destroying schools, dozens of churches, businesses, hospitals, and libraries.³⁵ Everything was set on fire and the community was razed.³⁶ We also know that machine guns were mounted on a hill and explosives were dropped from above.³⁷

The ratio of whites to Black was about twenty to one, with the mob being about twenty thousand.³⁸ African Americans were trying to defend their homes and themselves, and ultimately were put in internment camps.³⁹ The community was, in fact, decimated.

I want to share with you a story about one of my clients, Olivia Hooker. I will let her tell you what happened that day.⁴⁰ [VIDEO CLIP]

ART FENNEL: Dr. Olivia Hooker was just a little girl but vividly recalls when the invading whites came to her home.

DR. OLIVIA HOOKER: Oh, I remembered vividly. Early in the morning of the riot I heard this noise. It was hitting the house. So I said to my mother, "[h]ow can it be hailing when the sun is shining?" And my mother said, "[c]ome with me." And she peeped through the shades and showed me. She said, "[y]ou see that thing up there on top of the hill? That's a machine gun. And you see the American flag on top of it? That means that your government is shooting at you." This was a terribly distressing thing to a six year old, that my government was shooting at me. Then they came into the house, you see. Everybody else ran, but my mother said, "I'm going to pour water on my house to keep it from burning." So we were still in there. And they, you know, they destroyed my grandmother's sewing machine. They set her bed on fire. They broke everything they couldn't take.

30. Dreisen Heath, *The Case for Reparations in Tulsa, Oklahoma*, HUM. RTS. WATCH (May 29, 2020, 8:00 AM), <https://www.hrw.org/news/2020/05/29/case-reparations-tulsa-oklahoma>.

31. *Id.*

32. A REPORT, *supra* note 19, at 159.

33. Heath, *supra* note 30.

34. *Id.*

35. A REPORT, *supra* note 19, at 22.

36. *Id.*

37. *Id.* at Tulsa Race Riot – Map 4.

38. *Id.* at 63.

39. *Id.*

40. Heath, *supra* note 30.

This was one of our clients, she was ninety-six at the time. There were so many of them. As I mentioned, many were homeless, destitute, and terrorized. They were in no position to seek legal recourse during this time period. They tried to seek some relief in the court system, but soon realized its futility. Despite the fact that we know B.C. Franklin did a yeoman's job trying to get insurance claims for property damage during that time period. Law enforcement and the political process were infected by the Ku Klux Klan. During that time period Blacks could not get any justice in the civil and criminal justice system. They were ultimately left to themselves.

This [referring to photo] is people picking through the rubble to try to find their belongings. Ultimately, people resorted to living in tents, sometimes up to eighteen months after the Massacre.⁴¹



Image courtesy of Oklahoma Historical Society

We know that the city and state officials buried evidence and discouraged litigation, making it impossible for the victims to produce the record needed to prevail. The victims were buried in unmarked graves, and the government failed to investigate or prosecute any of the perpetrators.⁴² Not a single criminal act has ever been prosecuted by the government on any level, whether it is murder, arson, or assault.⁴³ In fact, the Greenwood community itself was initially blamed for the Massacre in the local white newspapers.⁴⁴ Evidence was

41. Heath, *supra* note 30.

42. *Id.*

43. *Id.*

44. A REPORT, *supra* note 19, at 89.

hidden or destroyed and talk of the riot was squelched.⁴⁵ The suppression was so complete that in 1996 or 1997—right around the time the Tulsa Commission started its investigation—the mayor was not even aware that the Massacre had taken place.⁴⁶ The Oklahoma history books excluded it.⁴⁷ In this kind of environment, no one could successfully bring litigation.

Fast forward, eighty years later, in an effort to address this conspiracy of silence that surrounded the Massacre and its aftermath, the State of Oklahoma commissioned a study to figure out what was going on.⁴⁸ It was not until 2001 that the full truth was revealed.⁴⁹ It was only twenty years ago when it became apparent.

The Commission's report was issued on February 28, 2001.⁵⁰ It was the result of a four year extensive study done by a team of investigators, historians, legal scholars, forensic specialists, archeologists, anthropologists, you name it.⁵¹ They were combing through archives, libraries, and court documents all over the country.⁵² This [effort] ultimately produced about 20,000 pages of materials and involved interviews of hundreds of survivors and witnesses.⁵³

For the first time the government was implicated in the Massacre and its aftermath. We know that the State National Guard had participated in the destruction and killing of Black Americans.⁵⁴ The city had deputized and armed its white citizens. In fact, the government accepted moral culpability at the time [of the Commission Report's publication]. Despite that, the government refused to pay any restitution to the victims or their descendants, which ultimately forced them to file a lawsuit in federal court in the Northern District of Oklahoma.⁵⁵

[In this lawsuit] we were armed with critical evidence that was never available before. We represented over 130 survivors seeking relief in federal court, bringing claims against the government for violating the Constitution and various federal statutes. We filed our case on February 28, 2003, literally two years after the report came out—when we got the information and were armed with the evidence for the very first time. I got to be part of a “dream team” of lawyers and others, who I mentioned earlier brought the case.

The district court acknowledged the complexity and seriousness of whether those claims should be adjudicated on the merits. Nonetheless, it dismissed the case, on the grounds that the two year statute of limitations had expired.⁵⁶ They had two years from the date of the Massacre to file their lawsuit.

45. *See id.* at 25.

46. *Id.*

47. James Kusatsu, *Curator of the Oklahoma History Center Discusses Why the History of the Tulsa Race Massacre Was Hidden*, PA NEWS TODAY (May 15, 2021), <https://pennsylvanianewstoday.com/curator-of-the-oklahoma-history-center-discusses-why-the-history-of-the-tulsa-race-massacre-was-hidden/140968/>.

48. A REPORT, *supra* note 19, at 1.

49. *Id.* at ii.

50. *Id.*

51. *Id.* at 3.

52. *Id.* at 3–4.

53. *See* A REPORT, *supra* note 19, at 1.

54. *See id.* at 19.

55. *Alexander v. Oklahoma*, No. 03-C-133-E, 2004 U.S. Dist. LEXIS 5131, at *2 (N.D. Okla. Mar. 19, 2004).

56. *Id.* at *22.

You can imagine how devastating that was for our clients, Otis Clark, who was 104-years-old, was told once again that despite the Commission Report's conclusion of government participation and culpability, the legal system would not provide a remedy. Too late for justice to be done.

We put forth a number of theories as to why and how the case could be exempted from the statute of limitations. I am going to talk a little bit about that. So please forgive me for those who do not love procedure. These [theories] included accrual, equitable estoppel, and equitable tolling which were all rejected by the court. We ultimately appealed to the Tenth Circuit. I had a chance to write the historians' brief on behalf of John Hope Franklin, Scott Ellsworth, and others. We submitted our appeal and that too was denied. We sought rehearing *en banc* and that was denied.

We ultimately filed a petition for writ of certiorari in the Supreme Court, and that was denied. We ended up going through all of the possible channels we could through the federal legal system. By this time I was a law professor and did what any self-respecting law professor would do under the circumstances—I wrote a law review article!⁵⁷ It examines statutes of limitations and argues why and how they should be exempted in these types of cases of government-sanctioned racial violence.

I want to share a little bit about why the court got it wrong. When we think about statutes of limitations, what are they? It is basically a deadline. It is just a deadline. It is a political choice. The legislature devises statutes of limitations. They can make it long or short; it is a reasonable time period that somebody has to file a lawsuit. Not only is it a political choice that the legislature makes, the courts also have the power and authority to exempt statutes of limitations. They [courts] have the discretion and they [courts] have the power. Courts can and do make exceptions to statutes of limitations. That happens all the time.

I want to offer a couple of things to think about. First, the notion of accrual. When does the claim actually take place? When are you allowed and expected to file a lawsuit? Usually when you are injured. It might be on the day of your injury, it might be on the day that you discover that you were injured, or it might be on the day that you should have reasonably discovered that you were injured. So we have accrual. The problem here is that the court took the position (and I am paraphrasing here) that you should have known that you were injured because you were in the middle of a massacre! You were obviously injured.

But that is a misunderstanding of what we mean by "injury." We are not talking about an individual tort against a particular person. We are talking about participation of the government in a systemic problem and causation, where the government is arming a white lynch mob and enabling the white mob. They [the plaintiffs] would have hardly been in a position to understand the role of the government in the midst of a terrorist attack, in the midst of a massacre. We argued that it was not obvious that the claim had accrued. We do not see the injury in the same way.

Not to mention, it was not obvious until the Tulsa Commission Report came out in 2001, when for the first time, the government conceded culpability and we had the evidence of that.

57. See Malveaux, *supra* note 2.

Now you might think, of course, we want people to be diligent. You want them not to sit on their rights. We want them to go ahead and proceed. But the law is designed for normal everyday people. As amazing as B.C. Franklin was to be able to set up shop in a tent and do the work that he did, that is an extraordinary effort. We do not expect that of most people. Most people are not going to be able to pull it together and bring a lawsuit within two years from the date of that kind of massacre and understand the government's role in that. I want to share with you again B.C. Franklin's extraordinary efforts. [VIDEO CLIP of Dr. John Hope Franklin describing the efforts of B.C. Franklin in 1921]

ART FENNELL: Dr. John Hope Franklin is B.C. Franklin's son.

DR. JOHN HOPE FRANKLIN: He was establishing his law office in a tent. The Black part of Tulsa has been razed to level, nothing but ashes. The place he got for us to live was gone; everything else was gone. And he was practicing law in a tent, suing the state, suing the insurance companies, trying to do something to get remuneration for his clients.

Obviously that is an extraordinary effort made by an extraordinary attorney, but not something that we expect everyone to be able to do. The law is designed for normal people. Would the average person have known that the government was responsible? Would they have been able to bring their claims?

Second, another idea that we hear about is equitable estoppel. Equitable estoppel simply means the clock is ticking and the court has the power to estop the defendant from actually relying on the statute of limitations because of equitable reasons, because justice needs to be done. And if the defendant has done something wrong, like they have fraudulently concealed their conduct or their behavior and it is impossible for somebody to bring their case, then we are not going to allow the defendant to rely on the statute of limitations.

Here we have a total cover up by the government. The government's hiding information, and for decades is concealing the information that was needed. Under those circumstances, nobody could have known the extent of the government's participation, and so the court should not allow the defendant to rely on the statute of limitations as a defense.

We have seen that in another case. We think about the Jewish Holocaust cases we brought. I had the opportunity to participate in some when I was working at Cohen, Milstein. We sued the banks who were operating in France during WWII. The plaintiffs were able to sue those banks that held money and stole that money from Holocaust survivors. They were able to do that fifty years after the fact. Why? Because the court estopped the defendant from being able to rely on statute of limitations.

Because of the conspiracy of silence, because of the consistent misrepresentation and the denial that occurred, because of the fraudulent concealment, that justified the statute of limitations being tolled here. Not only did the government hide that information, but it affirmatively misrepresented that it would provide reparations at the time—lulling people into a sense of complacency that they do not have to file complaints during that time period.

Third, another concept that the court can rely on is equitable tolling; that is the clock is running, but the court can stop the clock for equitable reasons and that is if there are "extraordinary circumstances." So if the courts are not available, if there is no way you

can get the information to bring your claim, the court has the power to toll the statute of limitations.

Certainly when you think about what was going on in 1921, these are extraordinary circumstances if there ever were some. You have your own government handing out guns to people, deputizing them, giving them the authority; basically, arming a lynch mob to attack American citizens. You have the court system infected by the Ku Klux Klan. You are not getting any justice in the civil or criminal justice system. We have the Jim Crow era. We have “separate but equal.” We have the law that literally deprives Black folks in terms of equal opportunity, deprives them of rights that we take for granted today.

And so, in our case, the court did acknowledge (and I am paraphrasing) that these were extraordinary circumstances; thus we are going to toll the statute of limitations for forty years. Up to forty years. We are going to get you to the 1960s, when Jim Crow laws were being dismantled and new civil rights acts were coming. That is a reasonable time, right?

Tolling the statute of limitations gave us forty years. Why was that not good enough, though? Because we know that overnight Jim Crow does not disappear. Having civil rights acts on the books does not change things overnight. We continue to see intimidation, violence, fear, and trauma, not only for the survivors, but for the descendants. There is ongoing trauma, ongoing historic problems.

The analogies the courts use do not help us. They do not tell us anything about these extraordinary circumstances. Analogies like: there was a war, and the war is over and now there is peace. Or there was some brutal regime and the dictator has been overthrown, so now these extraordinary circumstances are over. It does not work that way here. Where we draw the line is not so clear. It does not change overnight.

Not to mention that people had no way of knowing about the government’s role and the extent to which it caused this Massacre.

So the question was, should the statute of limitations be tolled until 1982, when Scott Ellsworth came out with his definitive book on the Tulsa Race Massacre? Would that have gotten you far enough along? We argued no, it would not, because the Tulsa Commission Report did not come out until 2001. The 20,000 pages of information [in that Report] gives a clear sense of the government’s role. Nothing else even comes close.

What did the court do wrong? The court not only failed to permit normal exceptions to the statutes of limitations, but did not use its discretion to do the right thing. It did not ask itself (and I am paraphrasing here): what are the underlying rationales for statutes of limitations and were they being served here? And it turns out no, they were not served here.

We think about why we have statutes of limitations. We might say repose. We want to give the defendants peace of mind; after a certain amount of time they should be left to carry on, wipe the slate clean. We are going to give them peace of mind. But why should we put peace of mind for the government, who we know is guilty, over the victims of the Massacre? That makes a mockery of the justice system, when you have that kind of prioritization.

What about promoting accurate fact finding? The statute of limitations is there because we are concerned, we do not want the defendants not to have the opportunity to

defend themselves and to be ambushed by plaintiffs because evidence has been lost, memories faded, and so forth. That would not be fair. But we automatically assume that the problem is that the evidence is going to be more unreliable over time, which is not necessarily true. It is not always the case.

This [the Tulsa case] is a great example. Actually, the evidence got better over time. If we think about testimony and how the passage of time actually helped to gather accurate testimony. People had the courage, fortitude, and ability to come forward after a certain amount of time, after that trauma here, and in a very different climate. You have the bipartisan Commission doing this thorough investigation, clearly something very different than what was going on in the 1920s. People who were too afraid to even tell their story felt like they could, in fact, tell their story. And the defendant, they did not have to take personal responsibility for what had happened. They, too, could accept that information in a space where that information could come out. There is also better evidence due to new technology, DNA, computers, and so forth. The passage of time does not necessarily mean that evidence is not going to be good.

Not to mention, we do not always need the best evidence. Some evidence is good enough. Our system is replete with examples of justice that is good enough. We have it all the time. So rough justice is better than no justice. We think about settlements—rough justice. We think about class action representation—rough justice. We think about burdens of proof, preponderance of the evidence—rough justice. And that is the norm in our legal system. So even that rationale does not serve us well here when we think about protecting the interests that statutes of limitations were designed to do.

Certainly, there is no evidence that the plaintiffs themselves were engaged in misconduct. We have evidence that they did everything they could possibly do to bring claims during that time period here.

And when we think about stale claims, sometimes we assume that stale claims are bad claims. But we know that there are reasons that folks do not come forward. Sometimes we assume that stale claims are frivolous claims, but know that is not always the case. If we think about it, many folks do not come forward on time. If you think about sexual assault and rape, if you think about children who are devastated. Many of our clients were children during this time period. Think about your parents shot and killed, your house burnt to the ground, your community destroyed. The kind of fear you would have would be absolutely debilitating. Just because a case is untimely does not mean that it is not a strong case.

Ultimately, one might say that we have to impose some kind of reasonable limitation. It's just a deadline. This is ridiculous. At some point, one might say it is too late. Seventy-five years after the Massacre, this is getting a little ridiculous. Why are these stale claims here?

And I think that makes sense if you only see things in a vacuum, if you do not take into account perspective, the context here. Why is it that it took them until 2003 to bring the first constitutional claim in federal court over this Massacre? They could not do it beforehand. They tried everything, did everything, to no fault of their own. They could not get justice in the court system. So by not allowing the plaintiffs the opportunity to seek relief in the court system, it really undermines the legitimacy of our court system, and

really our humanity, when you think about it.

So we did everything we could through the court system. I did everything I could through the scholarship route.

We decided to go the legislative route. We actually brought similar legislation and a couple of days ago, there was a similar hearing. We did the same for the case in 2001: The Tulsa Greenwood Race Riot Claims Accountability Act of 2007. This [referring to photo] is John Hope Franklin, Representative John Conyers, who at the time was the Chair of the Judiciary Committee, and myself. We made the argument at the time for H.R. 1995, basically arguing that the statute of limitation should be tolled in our case and we should get five years to bring our claims from the date the legislation is enacted. This did not work. We were not able to succeed legislatively. Again, that notion of political will. This is a decision that can be made by Congress and can be a priority for the legislators.



When that did not work, we tried an international effort. Professor Charles Ogletree and Gay McDougal with Global Rights appeared before the Organization of American

States, the Inter-American Commission on Human Rights, arguing that it was a violation of human rights that our clients could not get access to the court system here in the United States and could not get an effective remedy. We were not successful there.

Ultimately, what we ended up doing was going into an educational mode. We had to give voice to our clients. This is what we could do. And we started going around the country telling the story of the Tulsa Race Massacre of 1921. There were a number of really exciting and important documentaries that were put together: one was by Reggie Turner called *Before They Die*. Art Fennell put together a documentary called *Terror in Tulsa*, which won an Emmy award. And so we started to tell the story of the Tulsa Race Massacre, giving voice to what had happened and trying to address the ignorance around this issue. Here is Professor Charles Ogletree. [VIDEO]

ART FENNEL: The survivors who were left travel the country telling their story at packed symposiums like this one, at Temple University, where legal scholars review and discuss and debate manners of recourse, even now.

PROFESSOR CHARLES OGLETREE: I hope the students who are here at Temple and other places will pay very close attention to this, because we always read cases about decisions that already made history. And here is a case study about the opportunity to affect history.

ART FENNEL: But they know that time is not on their side. The few survivors who remain are all in their 90s, and beyond. And they count their blessings each and every day.

DR. OLIVIA HOOKER: And now we have a chance to wake up America's soul and hopefully can stir up enough indignation that something will be done. It's not money that we were looking for. We were looking to have American acknowledge that these, this war had been waged against American citizens.

So that is what we did. We ended up touring around the country, telling our story of the Massacre, the work that we have done to try to get relief for our clients. This [referring to photo] is a picture of myself and Dr. Olivia Hooker at Temple University.



I mentioned to you before the humor that my clients brought. This is a funny photo. We were at Temple University sitting on the dais, to give remarks and Dr. Hooker realized

that she had forgot her teeth. We tried to get them, but ran out of time, so she gave the presentation without them, and did a great job! We had a good laugh that day.

As I mentioned, another client Otis Clark, we went to Abyssinian Baptist Church in Harlem. Again, we ended up telling our story. He had me laughing. Usually, we would give our presentation. I talked about the statute of limitations. While I am doing that, he is on the dais asleep. I have to nudge him a little bit, wake him up and he tells his story and then goes right back to sleep. I do not know if it was my presentation on the statute of limitations that had him asleep, but we did a lot of laughing together over those kinds of things!



I will say that it is really exciting that today the struggle continues. Never giving up and never forgetting. As you know, there is new litigation with one of the original lawyers in the lawsuit, Demario Solomon-Simmons, and others, who are continuing that fight through litigation. We are excited about the new lawsuit, new legislation that has come out to try to use different theories that might be available to get some relief for their clients.

I want to end by really thanking the survivors, thanking the descendants, and the community of Greenwood and North Tulsa for putting their faith in us and letting us hold their precious claims in our hands—the constitutional claims and the types of new claims that there are today—and really support us on this journey. As you know, it is so important that the litigation, the legislation be community-driven and community-benefitted. I so appreciate their support and their love. That is what drove us and enabled us to do this work.

I am grateful that the fight continues, and I am confident that we are going to

succeed, no matter how we define success. I am going to close with a quote from Dr. Martin Luther King, Jr., from A Letter from a Birmingham Jail, in terms of why we will not wait.

For years now, I've heard the word "wait." It rings in the ear of every Negro with a piercing familiarity. This wait has almost always meant never. We must come to see what one of our distinguished jurist of yesterday said: "That justice too long delayed is justice denied." We have waited for more than 340 years for our constitutional and God-given rights.⁵⁸

We will not forget. We will not give up. Thank you.

58. Letter from Martin Luther King, Jr. To Bishop C.C.J. Carpenter et al. (Apr. 16, 1963), <https://billofrightsinstitute.org/primary-sources/letter-from-birmingham-jail>.